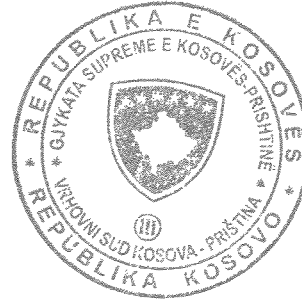


SUPREME COURT OF KOSOVO

Pkl. – Kzz. No. 97/2010

1 February 2011

Prishtinë/Priština



IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Lars Dahlstedt as Presiding Judge and Supreme Court Judges Emine Mustafa and Marije Ademi as panel members.

Assisted by EULEX Legal Officer Sampsa Hakala as the recording officer,

In the criminal proceedings against **Abedin Muzlijaj**, , date of birth
, name of father , name and maiden name of mother ,
, place of birth , village, Municipality of , currently residing
, Personal ID number , occupation

Convicted by the verdict of the District Court of Pejë/Peć in case AP.nr. 93/2010, dated 7 September 2010 for the criminal offence of Abusing official position or authority contrary to Article 339 paragraph 2 in conjunction with paragraph 1 of the Criminal Code of Kosovo (CCK) and sentenced to one (1) year and six (6) months of imprisonment.

Deciding upon the request for protection of legality filed on 19 October 2010, by the Defence Counsels Orhan Basha and Ferid Gjikolli on behalf of the defendant against the judgments of the Municipal Court of Klinë/Klina P.nr.36/2010, dated 25 March 2010, and of the District Court of Pejë/Peć AP.nr. 93/2010, dated 7 September 2010.

After having read the opinion and motion of the Office of the State Prosecutor of Kosovo submitted on 8 December 2010 by State Prosecutor Laura Pula and after a deliberation and voting of the Supreme Court Panel held on 1 February 2011.

Acting pursuant to Articles 454 and 456-457 of the Kosovo Code of Criminal Procedure (KCCP) renders this

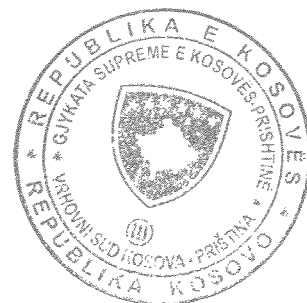
JUDGMENT

The request for protection of legality, filed on 19 October 2010 by the defendant Abedin Muzlijaj through his Defence Counsels against the judgment of the Municipal Court of Klinë/Klina, P.nr 36/2010, dated 25 March 2010 and against the judgment of the District Court of Pejë/Peć, Ap.nr.93/2010, dated 7 September 2010 is PARTIALLY GRANTED.

The judgment of the District Court of Pejë/Peć Ap.nr.93/2010 is modified as follows:

Based on Article 73 paragraph 1 of the Criminal Code of Kosovo and Articles 278 paragraph 7 and 391 paragraph 5 of the Kosovo Code of Criminal Procedure the time spent in detention on remand and in house detention will be included in the punishment of imprisonment.

The request for protection of legality is REJECTED as unfounded in the remaining parts.



REASONING

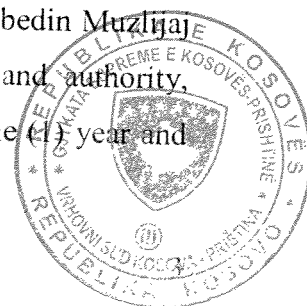
I Procedural history

On 1 February 2010 the Special Prosecution Office of Kosovo (SPRK) filed the indictment (PPS.nr. 2/2010) whereby Abedin Muzlijaj was charged for the criminal offences of Abuse of official position and authority, contrary to Article 339 paragraph 2 in conjunction with paragraph 1 of the CCK and Fraud, contrary to Article 261 paragraph 1 of the CCK.

The main trial against Abedin Muzlijaj was held on 5 March 2010 and 25 March 2010 in the Municipal Court of Klinë/Klina. On 25 March 2010 Abedin Muzlijaj was convicted by the verdict (P.Nr. 36/2010) for the criminal offence of Abuse of official position and authority, contrary to Article 339 paragraph 2 in conjunction with paragraph 1 of the CCK. Abedin Muzlijaj was sentenced to a term of one (1) year and six (6) months of imprisonment. The term of imprisonment was suspended on the condition that the defendant compensated the damage caused to Z T and N T as determined by the same verdict in the sum of 4.500,00 (four thousand five hundred) Euro and 700,00 (seven hundred) Swiss Franc. Time spent on detention on remand and house detention was counted as part of the imposed punishment.

The Municipal Court of Klinë/Klina acquitted Abedin Muzlijaj of the charge of Fraud, contrary to Article 261 paragraph 1 of the CCK.

The above mentioned verdict was appealed by the two Defence Counsels of the defendant and by the Special Prosecutor. Acting upon those appeals the District Court of Pejë/Peć with a verdict (AP.Nr. 93/2010), dated 7 September 2010 rejected the appeals of the defence and partially granted the appeal of the Special Prosecutor. The verdict of the Municipal Court of Klinë/Klina was modified as to the punishment and Abedin Muzlijaj was sentenced for the criminal offence of Abuse of official position and authority, contrary to Article 339 paragraph 2 in conjunction with paragraph 1 to one (1) year and



six (6) months of imprisonment without suspending the punishment. The first instance verdict was affirmed as to the acquittal of Abedin Muzlijaj for the criminal charge of Fraud, contrary to Article 261 paragraph 1 of the CCK.

The judgment of the District Court of Pejë/Peć was served to the defendant on 2 October 2010.

On 19 October 2010 Defence Counsels Orhan Basha and Ferid Gjikolli filed a request for protection of legality on behalf of the defendant Abedin Muzlijaj against the verdict of the Municipal Court of Klinë/Klina (P.Nr. 36/2010) and verdict of the District Court of Pejë/Peć (AP.Nr. 93/2010).

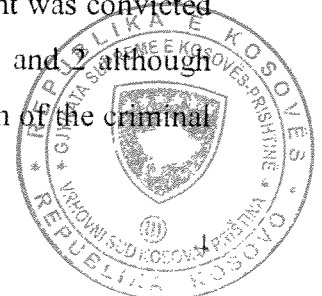
On 8 December 2010 the OSPK filed a reply to the request of protection of legality.

On 12 December 2010 the President of the assembly of EULEX judges decided (JC/EJU/OPEJ/2146/mgc/10) that the panel of the Supreme Court would be composed of one EULEX Judge presiding and two Kosovo judges as panel members.

I Issues raised in the Request for protection of legality and the response of the prosecution

In the request for protection of legality the defence alleges the following violations of the rules of criminal procedure and a violation of criminal law:

- Article 403 paragraph 1 item 12 of the KCCP was violated by both instances because the enacting clause is in contradiction with the reasoning of the judgments.
- Criminal law was violated by both instances because the defendant was convicted for the criminal offence as provided in Article 339 paragraphs 1 and 2 although the specific intent to cause damage as is required by that provision of the criminal



code had not been established. The defendant was never even charged with the intent to cause damage.

- Article 403 paragraph 2 of the KCCP in conjunction with Article 415 of the KCCP was violated by the District Court of Pejë/Peć because the second instance court exceeded the scope of appellate review by re-qualifying the criminal offence to the disadvantage of the defendant.
- The law was violated because the time spent in detention and house detention was not included in the punishment imposed by the District Court of Pejë/Peć. The exact period of time credited by the Municipal Court of Klinë/Klina, was not specified adequately.
- Criminal law was violated by both instances because the defendant was convicted for a criminal offence he did not commit.

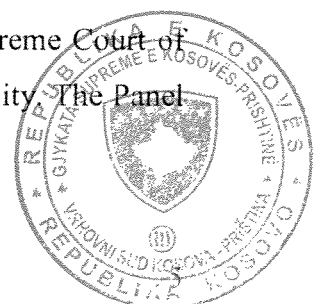
The defence of Abedin Muzlijaj proposes to annul the challenged judgments and to return the case to the first instance for re-trial or, in alternative, to acquit the defendant or at least to mitigate the punishment by imposing a suspended sentence on the defendant

The State Prosecutor with her opinion and motion proposes to reject the request as unfounded. The prosecution finds that the enacting clause is comprehensible and describes the decisive facts and incriminating acts of the defendant. Sufficient reasons for the factual and legal findings were provided without any contradiction with the enacting clause. The sentencing was appropriate.

III Findings of the Supreme Court

A. Competence of the Supreme Court and the admissibility of the request

Pursuant to Article 454 and Article 26 paragraph 3 of the KCCP the Supreme Court of Kosovo has competence to adjudicate on the request for protection of legality. The Panel



is constituted in accordance with Article 3.7 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo no. 03/L-53.

The Supreme Court finds that the request for protection of legality is filed within the prescribed period of time and by persons authorized thereto.

The Supreme Court will now analyze and assess each of the issues raised in the request of the defence.

B. Is the criminal act, for which Abedin Muzlijaj is charged with, correctly qualified pursuant to Article 339 paragraph 2 of the CCK?

The defence of Abedin Muzlijaj has alleged that the Municipal Court of Klinë/Klina and the District Court of Pejë/Peć failed to apply Article 339 paragraphs 1 and 2 of the CCK in a rightful way. This, in turn, would amount to a violation of criminal procedure (creating a contradiction between the enacting clause and the reasoning part) as well as a violation of the criminal law (the specific intent to cause damage was not established as is required).

The alleged violations of criminal procedure and criminal law will be evaluated at the same time, since they are both related to the same question: how should Article 339 paragraphs 1 and 2 of the CCK be applied to the established factual situation in this case?

The District Court of Pejë/Peć with verdict AP.Nr. 93/2010 modified the first instance verdict only with regard to sentencing, whereas the factual situation was considered as correctly established by the court of first instance (page 7 of the English version of the verdict). The description of the criminal act for which Abedin Muzlijaj was convicted can be found in the verdict of the Municipal Court of Klinë/Klina P.Nr. 36/2010 (page 1 and 2 of the English version):



"The defendant is found guilty of the charge of Abuse of official position or authority, contrary to Article 339 Paragraph 2 in conjunction with paragraph 1 of CCK because, in his capacity as a police investigator of the murder of V. T., in 2006, with the intent to obtain unlawful benefit, he abused his official position – during February or March 2008 he went to the house of N. T., father of the deceased, in Pogradje and in the presence of Z. T. he asked the sum of 10.000 Euro to discover the author of the murder of V. T. with the justification that he had to pay the information sources. So he did although he knew that he could pay informants from the designated budget for Kosovo Police. In this way, he received the payment of 4.500,00 Euro and 700 Swiss francs from Z. and N. T., in three different occasions."

The defence of Abedin Muzlijaj has persisted throughout the criminal proceedings that even if the charged criminal act was proven, the defendant could not be convicted pursuant to the qualified form of the criminal offence as prescribed in Article 339 paragraph 2 of the CCK, because the defendant did not have the intention to cause damage. The defence in particular refers to the wording of Article 339 paragraph 2: *"When the offence ... results in a damage exceeding 2.500 EUR..."* whereas Abedin Muzlijaj was charged and convicted for the abuse of his official position with the **intent to obtain unlawful benefit** (in the amount of 4.500 Euro and 700 Swiss Franc). Thus the charge could only fulfill the criteria of Abusing official position or authority in its basic form (Article 339 paragraph 1) being punishable by imprisonment of up to one year.

The Supreme Court finds that the above mentioned grounds for the request for protection of legality are unfounded. The criminal offence has been correctly qualified pursuant to Article 339 paragraph 2 and the reasoning supporting the legal findings of both challenged verdicts is in sufficient collaboration with the contents of the enacting clause of these verdicts.

The defendant was convicted, because of the abuse of his official position with the direct intent to obtain unlawful benefit (in the amount of 4.500 Euro and 700 Swiss Franc). The



qualification of the act as provided in Article 339 paragraph 2 of the CCK was based on the fact that the offence resulted in a damage exceeding 2.500 Euro.

Article 339 Paragraphs 1 and 2 of the CCK read as follows:

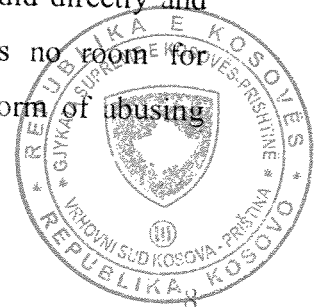
“Abusing Official Position or Authority

(1) An official person who, with the intent to obtain an unlawful material benefit for himself, herself or another person or a business organization or to cause any damage to another person or business organization, abuses his or her official position, exceeds the limits of his or her authorizations or does not execute his or her official duties shall be punished by imprisonment of up to one year.

(2) When the offence provided for in paragraph 1 of the present article results in a damage exceeding 2.500 EUR or a grave violation of the rights of another person, the perpetrator shall be punished by imprisonment of up to three years.”

As a guiding rule on how to interpret criminal law lies, above all, the *Principle of legality*: the definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted. In case of ambiguity, the definition of a criminal offence shall be interpreted in favor of the person being convicted (Article 1 paragraph 3 of the CCK).

Abedin Muzlijaj has performed the criminal act by requesting and receiving an unlawful payment by the means of deceiving the injured parties as described above. As a direct consequence of these actions the injured parties suffered from economical losses, which the defendant, in turn, was ordered to compensate. In other words, to follow the rule of *conditio sine qua non*, a causal connection exists between the criminal act and the injury. The injury would not have arisen without the act. A causal link has been established between the act and the result because the actions of Abedin Muzlijaj did directly and inevitably result in a damage exceeding 2.500 Euro. There remains no room for misinterpretation: the objective element (*actus reus*) of the qualified form of abusing official position or authority is fulfilled.

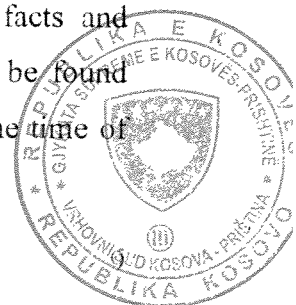


As to the subjective element (*mens rea*) of the criminal offence, the Supreme Court finds that – on the contrary to what the defense alleges – an *intention to cause damage* is *not required* in the second paragraph of Article 339 of the CCK.

Generally, criminal liability will follow intentional actions only. This results from Article 11 paragraph 3 of the CCK which provides that a person is criminally liable for the *negligent commission* of a criminal offence *only* when this has been explicitly provided by the law. Nevertheless, with regard to so-called serious consequences resulting from the commission of a criminal act it is regulated in Article 17 of the CCK (“Liability for graver consequences”) that when the commission of a criminal offence causes consequences which exceed the intent of the perpetrator and the law has provided for a more severe punishment, the more severe punishment may be imposed if the consequence is attributable to the perpetrator’s *negligence*.

The Supreme Court finds that Article 17 of the CCK applies also to the qualified form of Abusing official position or authority pursuant to Article 339 paragraph 2 of the CCK according to which a more severe punishment shall be imposed on the perpetrator when the offence provided for in paragraph 1 of the same article results in damages exceeding 2.500 Euro. The criminal offence as foreseen in the first paragraph of Article 339 of the CCK can be referred to as the “basic form” of Abusing official position or authority. The direct intention of the defendant to commit the basic form of the criminal offence is required whereas intention to cause damage is not required to find the defendant criminally responsible for the qualified form of this criminal offence. This was correctly determined by the courts of first and second instance.

In order to convict the defendant in this case it must be established that he acted with negligence as to the consequence (damage exceeding 2.500 Euro). Moreover, it must be determined that the defendant had an eventual knowledge of all relevant facts and circumstances but still performed the criminal act. Abedin Muzlijaj can not be found guilty for the qualified crime of Abusing official position or authority if, at the time of



committing the criminal offence he was unaware of the characteristics of that act (see Article 18 of the CCK "*Mistake of fact*").

The Supreme Court finds that it has been correctly established by both previous instances beyond reasonable doubt that Abedin Muzlijaj was well aware of his actions. He consciously requested and accepted the amount of currency (and requested even more) as charged and was aware that this would as a consequence result in economical losses for the injured parties. He would then knowingly proceed with the commission of the criminal act even though he was aware of the damage that would be caused as a result. The Supreme Court concludes that although the defendant did not have the direct intent to cause damage to the injured parties, his awareness of the qualifying circumstances still exist and the consequence of his actions were attributable at least to the defendant's negligence. Therefore the criminal act shall be qualified according to Article 339 Paragraph 2 of the CCK and the arguments presented by the defense in this point are rejected as unfounded.

C. Alleged violation of Article 403 paragraph 2 in conjunction with Article 415 of the KCCP because the second instance court exceeded the scope of appellate review

The defence alleges a violation of criminal procedure because the District Court of Pejë/Peć had re-qualified the criminal offence even though the first instance verdict had not been challenged by the appeal from Special Prosecutor with regards to the qualification of the offence.

After examining the English version of the District Court of Pejë/Peć verdict (AP.nr.93/2010) that was signed by the panel members, the Supreme Court finds that also this ground for the request for protection of legality is unfounded.

First it needs to be noticed that the District Court of Pejë/Peć modified the first instance verdict only with regard to sentencing whereas no re-qualification of the criminal offence



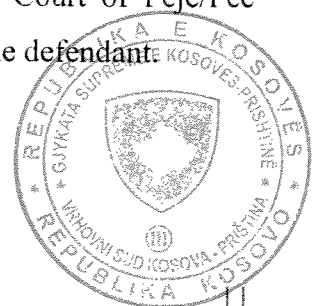
had been done. There is no discrepancy between the two judgments leaving aside the sentencing.

The defence has pointed out that the verdict of the District Court of Pejë/Peć would refer to different legal provisions as was done by the Municipal Court of Klinë/Klina verdict (P.Nr. 36/2010). Again reviewing the English version of the verdict shows that full reference has been made in the enacting clause of the verdict of the District Court of Pejë/Peć to Paragraphs 1 *and* 2 of the Article 339 CCK (page 1 of the English version). Exactly same provisions are to be found in the verdict of the Municipal Court of Klinë/Klina (page 1 of the English version). As the English language version, which is considered as the authentic version, does not include any actual re-qualification regarding to the name of the criminal offence or the referred provisions of the criminal code, no violation of the rules of criminal procedure can be established. This confusion by the defence appears to be caused by some shortcomings in the Albanian translation of the verdict of the District Court of Pejë/Peć (AP.nr.93/2010).

D. The law was violated because time spent in detention and house detention was not included in the punishment imposed by the District Court of Pejë/Peć

With the challenged verdict the District Court of Pejë/Peć (AP.nr.93/2010), while modifying the sentence to the disadvantage of the defendant, did not explicitly decide to include the time spent in detention and house detention. Crediting the deprivation of liberty in the punishment of imprisonment is mandatory as required by Article 73 Paragraph 1 of the CCK and this should be mentioned in the verdict in accordance with Articles 396 paragraph 4 and Article 391 paragraph 1 subparagraph 5 of the KCCP.

Because of this omission a violation of Criminal law as foreseen in Article 404 paragraph item 6 of the KCCP is established and the verdict of the District Court of Pejë/Peć (AP.nr.93/2010) shall be modified in this regard to the advantage of the defendant.



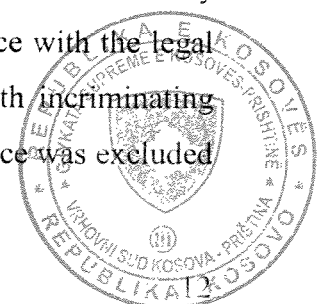
As to the question whether the precise period of time spent in detention or house detention should have been indicated in the verdicts of District Court of Pejë/Peć and Municipal Court of Klinë/Klina, the Supreme Court finds that such a precise calculation is not required by the law and that no violation can be established in this respect.

E. Alleged violation of Criminal law because Abedin Muzlijaj was convicted for a criminal offence he did not commit

This part of the request clearly disputes the factual situation as determined by the challenged verdicts of the Municipal Court of Klinë/Klina (P.Nr. 36/2010) and the District Court of Pejë/Peć (AP.nr.93/2010). The Supreme Court finds that pursuant to Article 451 paragraph 2 of the KCCP such a request for protection of legality, for erroneous or incomplete determination of the factual situation cannot be filed as it has been submitted by the defence in this case.

However, the Supreme Court will go on to assess whether the statement of grounds relating to the material facts were presented in the contested judgments according to the rules of criminal procedure. The provisions of the criminal procedure prescribe that courts shall state clearly and exhaustively which facts it considers proven or not proven, as well as the grounds for this. Courts shall also, in particular, make an evaluation of the credibility of conflicting evidence. As to the duties of the court of second instance, pursuant to Article 427 paragraph 1 of the KCCP, in the statement of grounds for its judgment the court of second instance must assess the statements which are the subject of the appeal. The failure to meet the demands of these provisions may result in a substantial violation of the provisions of the criminal procedure if such omission by the court has influenced or might have influenced the rendering of a lawful and proper judgment.

In the case at hand the Supreme Court finds that the assessment of evidence was done by the court of first instance (Municipal Court of Klinë/Klina) in accordance with the legal requirements and in a careful, transparent and convincing manner. Both incriminating and exculpatory pieces of evidence were assessed and no material evidence was excluded



from the main trial. The Court has clearly stated what it considered proven and what factual allegations remained unproven. As to the District Court of Pejë/Peć verdict it had as the second instance court provided an answer to all relevant questions raised in the appeals of the defence. This leads the Supreme Court to conclude that no violation of law can be established in this part of the request for protection of legality.

F. Sentencing

As to sentencing, the Supreme Court asserts that the District Court of Pejë/Peć did not exceed its authority under the law (Article 38 and Article 339 paragraphs 1 and 2 of the CCK and Article 404 item 5 of the KCCP) by imposing a term of imprisonment of one (1) year and six (6) months on the defendant. Sentencing was within the scope of appellate review as it was subject to the appeal of the Special Prosecutor. In conclusion, no violation of the Criminal Law can be established in the challenged verdict in this regard.

IV Conclusion


For the above mentioned reasons it has been decided as in the enacting clause.

Dated this 1 February 2011.

Pkl. – Kzz. No. 97/2010

Prepared in English, an authorized language.

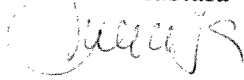
Presiding Judge


Lars Dahlstedt



Member of the Panel

Emine Mustafà



Recording Officer



Sampsa Hakala



Member of the Panel

Marije Ademi

